No. 88-2117

(3)

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1988

INCOME SECURITY CORPORATION, INC.,
and GARY FELTON,

Petitioners,

v.

LOUISIANA OILFIELD CONTRACTORS
ASSOCIATION, INC., *et al.*,

Respondents.

ALL RESPONDENTS' OPPOSITION TO THE PETITION FOR CERTIORARI

WILLIAM RUTLEDGE
DOMENGEAUX & WRIGHT
P.O. Box 3668
Lafayette, Louisiana 70502
Telephone: (318) 233-3033
(800) 252-1953

Counsel for all Respondents

QUESTIONS PRESENTED

1. Is the petition premature?

2. Are there any exceptions to the Anti-Injunction Act that would allow the injunction against the state case and allow the declaratory judgment that the suit there was an ERISA case of exclusive federal jurisdiction?

3. Were there any grounds for implying an exception, based on the *Mitchum* rationale?

4. Does the ERISA provision for injunction create an exception to the Anti-Injunction Act?

5. Are there equitable grounds for an exception to the Anti-Injunction Act?

6. Was this an ERISA case?

7. Was it proven to be?

8. Was it time barred?

9. Was there tolling either equitably or legally?

10. Is ERISA Constitutional in its application here?

11. Is LOCA entitled to a jury trial?

LIST OF PARTIES

The parties to the proceedings below were:

Income Security Corporation, Inc., Petitioner

Gary W. Felton, Petitioner

Louisiana Oilfield Contractors Association, Inc., Respondent

Louisiana Oilfield Contractors Association, Inc. Employee Benefit Trust, an ERISA Plan, Respondent

* Peter Borne, Respondent

* Malcolm Gordon, Respondent

* Rodney Guidry, Respondent

* George Crain, Jr., Respondent

* Randy K. Haney, Respondent

* Wayne Bullich, Respondent

* Edwin G. Preis, Jr., Respondent

* Ned Clark, Respondent

* Daniel Fruge, Respondent

* Vance Andrus, Respondent

* In his representative capacity as ERISA Trustee or fiduciary under the ERISA Plan; and in his individual capacity.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDINGS ii

TABLE OF AUTHORITIES v

OTHER STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

1. The petition is premature. 8

2. The Circuit Court Was In Compliance with This Court's Case Law and Obviously Did What Common Sense Dictates When It Vacated the Injunction and Declaratory Judgment Against the State Suit. 8

3. The Unique Facts of the *Mitchum* Decision, 407 U.S. 225 (1972), Make Its Rationale Inapplicable Here. 9

4. ERISA's Injunction Provisions Created No Exception Here to the Anti-Injunction Act. 11

5. If Mr. Felton Were an ERISA Fiduciary, He Is Not Sued As Such Because The Two-Hats Rationale Is Applicable Here. 16

TABLE OF CONTENTS (Continued)

Page

6. Mr. Felton's Claim of Federal Jurisdiction Is A Proper Concern of Sensible Judicial Administration. 18

7. Cases About Direct Attacks Upon, Or Invasions of the Trust-Corpus of An ERISA Plan Are No Help to Mr. Felton Since There Is No Such Attack Here. 18

8. Neither The Record Nor The Law Supported Summary Judgment Based On The ERISA Time-Bar. 21

9. Mr. Felton's Claim That LOCA Has An ERISA Right But No Remedy Violates LOCA's Constitutional Rights Under the Fifth Amendment of Due Process and Denial of Equal Protection. 22

10. Mr. Felton's Claim That LOCA is Denied a Jury Trial by ERISA Violates LOCA's Right Under The Seventh Amendment To A Jury in This Tort Case. 22

SUMMARY 23

CONCLUSION 24

APPENDIX A 1a

TABLE OF AUTHORITIES

Pages

CASES

Amalgamated Clothing Workers v. Richmand Bros., 348 U.S. 511 (1955) 10

Atlantic Coast Line R.R. Co. v. The Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 10

Bankers Trust Co. v. Texas & Pacific R.R. Co., 241 U.S. 295 (1916) 15

Chick Kam Choo v. Exxon Corp., _____ U.S. _____, 108 S.Ct. 1684 (1988) 10

General Motors Corp. v. Buha, 623 F.2d 455 (6th Cir. 1980) 20

Gilbert v. Burlington Industries, Inc., 765 F.2d 320, 322 (2nd Cir. 1985) 20

Marshall v. Chase Manhattan Bank, 558 F.2d 680 (2nd Cir. 1977) 19

Mitchum v. Foster, 407 U.S. 225 (1972) ..... i, 9, 10, 11, 20

Nieto v. Eckar, 845 F.2d 868 (9th Cir. 1988) 15

NLRB v. Nash-Finch Co., 404 U.S. 138, 146 (1971) 19

Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519 (1987) 10

TABLE OF AUTHORITIES (Continued)

Pages

CASES

Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889, 893 (2nd Cir. 1983) cert. d. 104 S.Ct. 148; cert. dismissed 104 S.Ct. 26 ..... 14, 17

Roberts v. Burlington Industries, 477 U.S. 901 (1986) .. 20

Sommers Drugstores Company Employee Profit Sharing Plan v. Corrigan Enterprises, Inc., 793 F.2d 1456 (5th Cir. 1986) cert. d. 107 S.Ct. 884, 1298 ..... 16, 17

Texas Employers Insurance Assn. v. Jackson, 862 F.2d 491 (5th Cir. 1988), cert. d. 57 U.S.L.W. 3704 (No. 88-1295, April 24, 1989) 8, 9

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 9. 10

Weber v. Anhauser-Busch, Inc., 348 U.S. 468 (1955) 10

STATUTES

29 U.S.C. §1132(d)(1) 1, 15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-2117

INCOME SECURITY CORPORATION, INC., and GARY FELTON,

Petitioners,

v.

LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., *et al*,

Respondents.

ALL RESPONDENT'S OPPOSITION TO THE PETITION FOR CERIORARI

Respondents, Louisiana Oilfield Contractors Association, Inc.; the Louisiana Oilfield Contractors Association ERISA Plan or Trust; and the trustees and fiduciaries thereof, individually and in their trust capacities, thus respectfully oppose the petition for certiorari:

STATUTES ALSO INVOLVED:

29 U.S.C. §1132(d)(1):

> An employee benefit plan may sue or be sued under this subchapter as an entity.

STATEMENT OF THE CASE

Any help we can give will be in a simple statement of facts told chronologically. Petitioners tell a half-told tale backwards. Petitioners will be called "Mr. Felton" (Gary Felton and his solely owned corporation, Income Security Corporation, Inc.) and respondents (Louisiana Oilfield Contractors Association, its ERISA plan and its plan's trustees in their representative and individual capacities), "LOCA."

The Louisiana Oilfield Contractors Association is an industrial trade association for the mutual benefit of its members, who are oilfield-contracting companies, and for their employees. LOCA created an ERISA plan for medical and disability benefits for those employees called the Louisiana Oilfield Contractors Association Employees Benefit Trust. It was an ERISA trust or plan to provide medical and disability benefits to the employees at a cheaper rate than the hospital and disability coverage the members could get individually or commercially. The trustees (ERISA fiduciaries of the plan) are also respondents here in their individual and representative capacities; they are Peter Borne, Malcolm Gordon, Rodney Guidry, George Crain, Jr., Randy K. Haney, Wayne Bullich, Edwin G. Preis, Jr., Ned Clark, Daniel Fruge and Vance Andrus.

These trustees controlled and operated the trust. (The Plan has always been called a "trust" and we continue to do so here.)

Before the trust could be formed and put into operation, the trustees had to have some information: whether the premium rates under this ERISA plan would in fact be cheaper for the employees (if not, nobody wanted the plan); and what permium rate should be charged to give the

employees advantage of lower rates but at the same time keep the trust solvent; and what type of reinsurance or "stop-loss" coverage and disability coverage should be obtained.

Mr. Felton entered the picture at this point, before the trust was formed. He represented himself to be an insurance broker or insurance consultant capable of recommending and obtaining the proper stop-loss coverage and disability coverage; and he undertook to get the proper coverage for the trustees; he represented that he was capable, in an actuarial capacity, of arriving at sound actuarial figures for premium rates that would again give the employees this advantage but also keep the trust solvent; and he undertook to provide that information, again, before the trust was formed.

After the trust had been in operation for some time, the LOCA trustees realized that Mr. Felton had been careless: first, he had not gotten the proper stop-loss coverage nor disability coverage; secondly, his premium rates were so low that the trust was going broke even with the best of experience and with the best of claims handling.

And as a result of Mr. Felton's carelessness as an insurance broker and his negligence as an actuarial consultant, the trust did go broke. For the purposes of the pleaded case, it went broke because of Mr. Felton's commercial malpractice in those fields.

Things got desperate. Hospital patients were being turned back at the hospital doors because there was no money to pay their hospital bills. Cancer patients who came to the hospital to get their malignat tumor removed were sent back home with it still there.

It became a nightmare. So the trustees rushed into the money market to borrow several million dollars on their own personal signatures and own personal security, their homes, their property, to pay these bills.

After the bills were paid, the trustees filed suit in state court for malpractice against Mr. Felton as an actuary and as an insurance broker. They demanded reimbursement or indemnity for the money they had to borrow and pay out and for damages. The ERISA trust had gone broke and had fallen in; nobody wanted to buy anymore hospital coverage from it no matter what. So, the Association and the trust and the trustees, these men who borrowed the money on their individual signatures, all sued Mr. Felton in state court.

Mr. Felton filed in state court a plea to the jurisdiction: that the state court was without jurisdiction. But he never set it for a hearing of any type, neither on the pleadings nor on the factual merits.

After several years, with his plea to the jurisdiction of the state court still pending and without provoking a trial of that plea, he runs off in the middle of the night to federal court and files this federal complaint to enjoin further prosecution of the state suit and to have it declared an ERISA case. This, after years of discovery of all types by a platoon of lawyers traipsing up and down the entire country.

LOCA did refer to ERISA in its state pleadings; but obviously LOCA could not plead itself into nor out of this special exclusive ERISA jurisdiction of the subject matter.

Such jurisdiction would have to be determined and only determined by the actual underlying jurisdictional facts no matter what the pleadings said. Such a trial of the jurisdictional facts has never occurred in either court, state or federal.

The federal injunction against prosecution of the state suit was entered on the pleadings of both cases and fragments of depositions showing no more than the statement of facts here.

This conduct of Mr. Felton's, in not even asking the state judge to rule on Mr. Felton's own plea to the jurisdiction before he ran off to federal court, sounds like something akin to prematurity or failure to exhaust state remedies.

The state judge, Judge Marcus Broussard of the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana, still sits there patiently waiting to rule on Mr. Felton's plea to the jurisdiction. He did not rule against Mr. Felton; he was not given a chance to rule either way.

Mr. Felton never indicated what he thought was wrong with Judge Broussard, whether he thought Judge Broussard was too dumb or too lazy to come up with the right answer to the jurisdictional question. So, Mr. Felton's ploy for federal injunction becomes, as it were, a writ of inquest against Judge Broussard, *de lunatico inquirendo*, as if it were against some bungling lunatic, half-mad, half-witted, too ignorant, too lazy, too sorry, too indifferent to decide this jurisdictional point correctly.

What is wrong with Judge Broussard? Nothing is wrong with Judge Broussard; he is neither corrupt nor biased, nor perverse; he is at least a judge of standard competency, at least average intelligence, average ability, and average diligence. If we were Judge Boussard, we would be thinking, "I wonder why Mr. Felton feels he needs a federal judge to decide this point; what's wrong with me; I'll try to do the best job I can in getting it decided right; if he thought something else, he could have simply brought a motion to recuse; I might not be the brightest judge in the world, but I'd sure have given it a good try."

Mr. Felton's federal maneuver is almost something personal against Judge Broussard, marking him as somehow too inferior to do the job. (Our recollection is that in the *Atlantic Coast Line* case, the proponents of federal injunction at least tried to get the state court to rule in their favor before running off to federal. But Judge Broussard was never afforded this courtesy.)

If Mr. Felton had not liked Judge Broussard's ruling, he had a state appellate chain he could go straight up to this Court just as he has used the federal chain here. All Judge Broussard can think now is "Well, I guess Mr. Felton thought that the federal judges could just do a better job than I would do, with more sense, more energy, more willingness to reach the right conclusion."

Mr. Felton talks of the need for speed to relief; if he really wanted speed he should have stayed where he belonged and pushed the point hard instead of this frolicking federal foray~~; all he~~ is really interested in is more delay any way he can get it to avoid the merits of our claim before a state judge and jury.

At any rate, all the Federal Circuit Court did was to vacate the federal injunction because it violated the Anti-Injunction Act and vacate the declaratory judgment because Judge Broussard could give Mr. Felton all the declaration he needed and also because it was an indirect violation of the Anti-Injunction Act.

LOCA filed many *alternative* defenses, some twenty-one, accompanying this as Appendix A; briefly, that the case was not an ERISA case but simply a malpractice claim under the proprietary sue-clause in ERISA; that the state case had not been barred by ERISA limitation for several reasons, legal and equitable; and that Mr. Felton's claim that the ERISA

statute totally wiped out malpractice cases brought against professional consultants by an ERISA plan without giving any relief, *quid pro quo*, was unconstitutional under the Fifth Amendment and that LOCA was entitled to a jury. (Mr. Felton's ultimate contention was that LOCA's was an ERISA case but that ERISA gave no remedy; so no matter how negligent and guilty of malpractice Mr. Felton was, LOCA had a claim against him that could not be enforced.)

Without an evidential hearing of the jurisdictional facts, the Federal District Court granted the injunction and declared the case one of ERISA jurisdiction. Since the findings and conclusions of that Court have been set forth, we have nothing to say about them but this: We were never given a day in court to show that this was not an ERISA claim; not a chance to call a witness; then the Federal District Court dismissed LOCA's state claim on the basis of the ERISA statute of limitation despite equitable and legal pleas against a time-bar that, again, required a merit hearing. These pleas were supported by LOCA's affidavits.

In Federal District Court, our prime plea was that the point was not *what* but *who*. The point was not what kind of case our state suit was, a proprietary case for malpractice or an ERISA case, but who should decide that point, Judge Broussard, to whom it was first presented, or the Federal District Court, who was to decide it hurriedly upon a plea for preliminary injunction.

On LOCA's appeal, the Circuit Court vacated the injunction and the declaratory judgment and remanded. The Federal District Court has yet to order the state record back to state court, but the mandate of the Circuit Court, all stays denied, is clear in that respect, that it should go back. (LOCA has declined, however, to move for enforcement of its mandate pending Mr. Felton's petition to this Court for certiorari.)

The Circuit Court's reversal cited its very recent *en banc* decision, *Texas Employers Insurance Assn. v. Jackson*, 862 F.2d 491 (5th Cir. 1988), cert. d. 57 U.S.L.W. 3704 (No. 88-1295, April 24, 1989), hereafter referred to merely as "the Jackson decision."

REASONS FOR DENYING THE WRIT

THE PETITION FOR CERTIORARI IS NOT NEEDED NOW

The petition for certiorari is premature. If the merits in state court determine that we have no jurisdiction or that we have not got any case, under any law, this ponderous jurisdictional question that Mr. Felton perceives will simply wash out. This is analogous to maritime cases. If on the merits there is no maritime case proven under American nor Australian law, there is no need for this Court to decide whether the case should have been tried under American or Australian

IN VACATING THE INJUNCTION AGAINST THE STATE COURT SUIT AND THE DECLARATORY JUDGMENT, THE CIRCUIT COURT WAS IN COMPLIANCE WITH THIS COURT'S RULING CASE LAW AND *OBVIOUSLY DID WHAT COMMON SENSE DICTATES.*

Mr. Felton seeks to distinguish the *Jackson* decision, above, page 8; he says that it was just a case under the Longshoremen's Act. To the contrary, this makes the decision more impressive. Petitioner for certiorari in *Jackson* showed a much stronger position; for there petitioner claimed not only the benefit of a federal statue, the Longshoremen's Act, but supposedly the benefit of the federal Constitution itself since the case involved a wet claim, a longshoreman hurt on navigable waters. Yet, federal statute and Constitution

considered, certiorari was denied. The Anti-Injunction Act was obviously applicable. To us, the *Jackson* case is about as strong as a decision can be in upholding the Anti-Injunction Act.

Every statute is presumably important, but if that in itself creates an exception to the Anti-Injunction Act, it becomes illusory, totally viscerated. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977).

Mr. Felton seeks a pincher attack in *Mitchum* and the injunctive provisions of ERISA; but clearly they are irrelevant to the case at hand and show no exception for injunction here.

THE UNIQUE FACTS OF *MITCHUM* MAKE IT INAPPLICABLE

On circumstances virtually unique, *sui generis*, *Mitchum v. Foster*, 407 U.S. 225 (1972), found an implied exception to the Anti-Injunction Act: implied authority under the peculiar circumstances Congress was dealing with. This was narrowly based on the idea that a problem facing Congress, and one that it had specifically in mind, was state "sheriffs who do not see, judges who do not hear." Congress was concerned that state judges would be personally prejudiced when they had cases involving civil rights before them; it was not merely the litigants before them, but also the judges themselves, that Congress saw as "part of the problem."

The petitioner in *Jackson*, above at page 8, also sought to rely on *Mitchum*, but the Circuit Court held: "However, *Mitchum* places heavy reliance on the fact that it was 'clear from the legislative debate surrounding passage of Section 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment against state

action. . . whether that action was executive, legislative, or judicial.' There is simply no comparable legislative history respecting the LHWCA [the Longshoremen's Act]. Moreover, *Mitchum* plainly requires, in order for the expressly authorized exception to be invoked, that 'an Act of Congress must have created a specific and a uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated in the federal court if the federal court was not empowered to enjoin a state court proceeding. *Id.* 92 S.Ct., at 2159." (Emphasis added.)

In short, Congress saw such state judges as part of the problem in *Mitchum*; but just as there is simply no comparable legislative history respecting the Longshoremen's Act, neither is there any respecting ERISA. When ERISA was passed, Congress did not see personal prejudice of state court judges as part of the problem. The *Mitchum* exception is not applicable because its rationale is not. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *Chick Kam Choo v. Exxon Corp.*, ____ U.S. ____, 108 S.Ct. 1684 (1988); *Amalgamated Clothing Workers v. Richmand Bros.*, 348 U.S. 511 (1955); *Weber v. Anhauser-Busch, Inc.*, 348 U.S. 468 (1955); *Atlantic Coast Line R.R. Co. v. The Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

Surely, the *Mitchum* decision is not to be extrapolated here by illusory analogy; implied exceptions based on *Mitchum* can only be supported by such extraordinary Congressional concern, and almost *in haec verba*, "judges who do not hear." Also in *Mitchum* there was a claim that there would be baseless, repetitious suits used as a weapon to violate Constitutional rights; no such claim is made here. Compare *Pennzoil Co. v. Texaco Inc.*, 107 S.Ct. 1519 (1987).

In *Vendo Co.*, above at page10, the federal proponent of injunction sought to extrapolate the *Mitchum* rationale into

the field of anti-trust where the Clayton Act contains express authority for federal injunctions. This Court held, and we believe that it was a holding on this particular point, that since there was only one state suit, not a repetitious series, there was neither express nor implied authority in the Clayton Act to enjoin the state case:

> "The Anti-Injunction Act, a fixture in the federal law since 1793, would then be a virtual deadletter whenever the plaintiff seeks an injunction under a federal injunctive statute. Whether or not the state proceeding could be enjoined would rest solely upon the traditional principles of equity and comity."

So the *Mitchum* decision offers no aid to Mr. Felton in his attempt to get around the Anti-Injunction Act. This prong of his pincher has been blocked. The only thing left is the injunctive provisions of ERISA itself.

ERISA'S INJUNCTIVE PROVISIONS CREATE NO EXCEPTION HERE TO THE ANTI-INJUNCTION ACT

After LOCA's plan was kicked off, Mr. Felton got himself employed as a claims-processor for LOCA's plan. He claims that ERISA had so glorified claims-processing ("Was your tonsillectomy really necessary?") that this makes him an ERISA fiduciary and that for some reason we must sue him under ERISA for this acturarial malpractice on his part although it has absolutely nothing to do with him claims-processing.

We denied that the ERISA statute so glorifies a claims-processor's job to the extent that he becomes an ERISA fiduciary simply as a result of processing claims. But claims-processor, glorified or common, we insisted that our claim

was not against Mr. Felton wearing his claims-processing hat, but against him wearing his actuarial and broker's hat; as such, ours is merely a proprietary claim against an insurance broker and actuary having nothing to do with ERISA jurisdiction.

Before turning to the ERISA provision for injunctions, we would test our theory by hypothesis: Suppose Mr. Felton had been a total stranger to LOCA's plan; suppose that he was not a claims-processor nor did he perform any other function for it; suppose one day he walks into LOCA's ERISA trust office with a sawed-off shotgun and takes all of the ERISA money out of the big ERISA safe there and flees; LOCA then sues Mr. Felton in state court in a civil action for conversion of this money, admittedly ERISA trust funds; does such a proprietary suit invoke ERISA's special exclusive jurisdiction?

If not, and surely not, let us add this element; suppose that he is a total stranger to LOCA's plan except that he processes claims for it; he is a daily employee of the ERISA plan for that purpose; suppose one morning he comes to work but instead of sitting down and processing claims he pulls a sawed-off shotgun out from under his raincoat and at gunpoint takes the LOCA ERISA funds out of the big LOCA ERISA safe in the LOCA ERISA office and flees; does this additional fact, that he is a claims processor for the plan, make the plan's civil suit against him for the conversion of the same money an ERISA case of exclusive jurisdiction? Surely, the question answers itself in the negative.

In the actual case, Mr. Felton has financially ruined the LOCA trustees and their ERISA trust through his actuarial malpractice and his careless insurance procurement, through his failure to get proper, adequate coverage as an insurance broker before the plan was kicked off, and his failure to give

sound actuarial consultation, just as surely as he could ruin the LOCA plan by robbing it at gunpoint if all the ERISA funds were kept in the big ERISA safe in the ERISA office.

Obviously, LOCA's claim for Mr. Felton's malpractice is just as much a proprietary suit as LOCA would have for his hypothetical robbery.

But this point we tried to get across below in vain. Nobody would listen. And nobody would give us a chance to make a record of it although our first alternative defense was a denial that our state suit was an ERISA case.

The injunctive provision of ERISA is 29 USC 1132(a)(3):

> "A civil action *may* be brought . . . by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan; . . ."
> [Emphasis added.]

The plain meaning of this injunctive provision shows that it is not applicable here. A malpractice claim is a proprietary action whether it is against a claims-processor or a true ERISA fiduciary; he is just sued under his other hat as actuary and broker.

LOCA could have done it the other way around: it could have let all the hospitals' patients sue it and the trustees; obtain judgment against it and the trustees; seize and sell their property; and then LOCA could turn to sue Mr. Felton for indemnity for his malpractice. Surely that would not be

an ERISA claim. This is a proprietary action by the trustees, not against them; there is no claim that Mr. Felton is a fiduciary who made bad or fraudulent investments; no equitable relief of any type is sought; no action "to enjoin any act or practice which violates any provision of this subchapter of the terms of the plan"; this is just a plain damage suit that has nothing to do the ERISA's injunctive provisions.

Moreover, and what is very important, this is *NOT* an attack upon the corpus of an ERISA trust. The trustees are not trying to get money out of the trust; they are trying to get damages out of Mr. Felton for his malpractice that injured the trust, his malpractice that occurred before the trust was formed but later did it damage; and whoever may be the owner of these damages is none of Mr. Felton's business; it is presumed that the trustees will make the proper application of them. (The trust has fallen in, *functus officio*; the only thing left is that the banks are about to fall upon the trustees' necks to get their personal notes paid. Mr. Felton's legal sleight of hand was never that too many people had sued here; but simply that they had sued in the wrong court.)

Mr. Felton cited below *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 (2nd Cir. 1983) cert. d. 104 S.Ct. 148; cert. dismissed 104 S.Ct. 26.

This citation is certainly strange comfort to Mr. Felton, since the case supports LOCA almost to the very facts. In *Pressroom Unions*, the plan sued insurance consultants [Mr. Felton's counterpart] *purportedly under ERISA jurisdiction* and essentially for their chiselling as insurance consultants [instead of the carelessness of Mr. Felton]; but the plan's suit was dismissed for *want of standing* and *thus want of*

ERISA jurisdiction because it was simply a proprietary claim; the Second Circuit held at page 893:

> Affording plans a power to sue does not, however, imply that they may bring actions under ERISA; it merely authorizes suits to be brought by funds in other situations where there would properly be jurisdiction. For example, if a fund became involved in a *contract dispute*, and wishes to pursue a state law contract claim, Section 1132(d)(1) [the ERISA sue-clause for proprietary claims] would allow the fund to bring such an action in its own name. [Emphasis added.]

This sue-clause, 29 USC § 1132(d)(1) is typical and provides:

> An employee benefit plan may sue or be sued under this subchapter as an entity.

A sue-clause in itself creates no federal question for jurisdiction. *Bankers Trust Co. v. Texas & Pacific R.R. Co.*, 241 U.S. 295 (1916).

This sue-clause merely entitles an ERISA plan to sue or be sued on proprietary claims. Subject or object, ERISA plans become involved in such suits as daily fare without invoking the special exclusive ERISA jurisdiction.

Likewise, in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), an ERISA plan or ERISA beneficiaries sued under ERISA, claiming special ERISA jurisdiction; they sued a lawyer for essentially professional malpractice; the Ninth Circuit dismissed the case for lack of jurisdiction since it was, again, merely a proprietary claim for state court under the sue-clause. (The plaintiffs complained that the lawyer's tardiness

had caused the ERISA plan to lose a lot of money, in the form of contributions that should have been paid into the plan but were not, because he waited too long to sue.)

TWO HATS

But Mr. Felton says his case is different; that he was also a claims-processor for the LOCA plan. We skip, for the moment, the question whether such clerical decisions as whether to pay for a tonsillectomy is such a significant decision that ERISA glorifies a claims-processor to the point that he is an ERISA fiduciary under that statute (any decision of Mr. Felton could be overridden by the trustees). Claims processor, common or glorified, or no claims-processor, the suit is not against Mr. Felton for negligence in claims processing; there is no count or theory on that; he is not being sued here with his claim processing hat on; he is being sued as an actuary who is guilty of malpractice that broke the ERISA plan; he is being sued on a proprietary claim against him with his actuarial hat on.

That ERISA parties may wear two hats, one invoking ERISA jurisdiction, the other not, was decided by the Circuit Court in *Sommers Drugstores Company Employee Profit Sharing Plan v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), cert. d. 107 S.Ct. 884, 1298. In the *Sommers* case, an ERISA plan brought suit against certain corporate directors who were also participants in that same ERISA plan; the plan alleged that the corporate directors were guilty of securities fraud in the purchase of assets (stock shares) *from that same ERISA plan*. (The defendants were also ERISA fiduciaries by virtue of their powers in connection with ERISA trusts.) The District Court held that ERISA preempted this claim of securities fraud against the corporate directors. The Fifth Circuit reversed this ruling, holding that the claim was not an ERISA claim but merely a proprietary claim that did not invoke ERISA jurisdiction;

the basis of the proprietary claim was a stockholder's claim that it (the ERISA Plan) was a victim of securities fraud in the purchase of stock from it, page 1468:

> "That in a case such as ours the [corporate] director happens also to be a plan fiduciary in the [ERISA] shareholder or benefit plan, has nothing to do with a duty owed by the director to the shareholder [not to commit securities fraud]. As director, the individual owes a duty defeined by state laws to the corporate shareholders *including the plan*; as fiduciary, the individual owes a duty *defined by ERISA* to the plan and its beneficiaries. Thus the state law does not affect relations between the ERISA fiduciary and the plan or plan beneficiaries as such; it affects them in their *separate capacities* as corporate director and shareholder."
> [Emphasis added.]

In short, the parties in *Sommers Drug Stores* wore two hats: as ERISA hat and a proprietary hat; and both plaintiffs and defendants were ERISA fiduciaries under one but not under the other.

So under these two cases, *Pressroom Unions* and *Sommers Drug Stores*, if LOCA had filed this proprietary suit for the malpractice of Mr. Felton in federal court instead of state, claiming ERISA jurisdiction, the case would have to be dismissed for want of such exclusive jurisdiction because the suit would obviously be a proprietary claim.

What does Mr. Felton think the sue-clause was put in ERISA for; a mere ornament?

We have no complaint against Mr. Felton as a claims-processor; he did not pay for a tonsillectomy too many; that is not part of our suit, never has been, never will be; LOCA has but two complaints–actuarial mistakes and insurance-broker mistakes; the expert witnesses that LOCA will send to the stand in this case are not claims-processors but actuaries and insurance consultants.

JUDICIAL ADMINISTRATION

It is a valid concern of judicial administration to consider that if this claim is pronounced and ERISA claim, then every time a plan sues on any proprietary matter, the parties will have to march right into the crowded federal courts; if the stationery supplier makes a mistake in the stationery, have to sue him in federal court since his claim has become one of exclusive federal jurisdiction.

This theory of Mr. Felton's, that since he was a claims-processor this case has to be in federal court, is just some expedient afterthought after the case has been in state court for years.

CASES ABOUT DIRECT ATTACKS ON THE TRUST-CORPUS OF ERISA PLANS ARE NO HELP TO MR. FELTON

Mr. Felton cites cases about the alienation, voluntarily or involuntarily, of interests in ERISA funds. The law is that a beneficiary of an ERISA retirement plan generally cannot alienate his interest in the ERISA plan, either voluntarily or involuntarily. State cases attempting to accomplish this are a direct attack upon the ERISA trust-corpus. If such "invasion of the trust-corpus" were allowed, the trust funds may be dissipated beyond the ability of the trustees to recover them, an irreparable harm. These cases generally involve attempts at

seizure through garnishment by judgment creditors or by mothers with dependent children seeking support money. Without going into whether they are analytically right or wrong, it is obvious that any injunction is based on the historical equitable ground that it is to prevent irreparable damage to the trust-corpus. There is no chance of that here since the trust and trustees are suing for money, not giving it away. There is no irreparable damage, no direct attack upon the trust corpus.

In Mr. Felton's citation, *Marshall v. Chase Manhattan Bank*, 558 F.2d 680 (2nd Cir. 1977), there was in effect an attempt to give the trust corpus away; Chase Bank as trustee of the ERISA plan sought to wind up the trust in state court because it had fallen in; the company funding the plan had been adjudicated bankrupt; Chase had received no directions for distribution in several years; so it decided to wind the ERISA plan up in state court and distribute [give the money away] to the beneficiaries; this in effect would be a "direct attack upon the trust corpus" leading to irreparable harm if the winding up was not proper. The Secretary of Labor filed for an injunction on the ground that winding up the ERISA trust was an activity that should be done, if at all, in federal court. In allowing the injunction to stand, the Second Circuit pointed out the well-settled rule that the Anti-Injunction Act does not apply in cases brought by representatives of the United States government such as the Secretary of Labor; the act "was not intended to hamstring federal agencies in the utilization of federal courts to protect federal rights." 558 F.2d 683.

In doing so, the Second Circuit was following this Court's instructions in *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971) which held that the Anti-Injunction Act does not apply to government officials and representatives.

In Mr. Felton's citation, *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980), there was the typical attempt at involuntary alienation through garnishment by a judgment creditor of a beneficiary's interest in an ERISA trust-corpus; the Sixth Circuit approved a federal court injunction against the state court "when a district court finds that an action in the state court would have the effect of making it impossible for a fiduciary of a pension plan to carry out its responsibilities under ERISA, the anti-injunction provisions of §2283 do not prohibit it from enjoining the state court proceedings." Page 459.

The short answer here is that the suit by the LOCA trustees to recover money will not "have the effect of making it impossible for a fiduciary of a plan to carry out its responsibilities under ERISA."

Whether these types of cases, concerning direct attacks upon the trust-corpus, are right or wrong in either their use of the ERISA injunctive provision or in their use of *Mitchum*, above page 9, they are certainly distinguishable from the case at bar.

In Mr. Felton's citation *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 322 (2nd Cir. 1985), aff'd. sub. nom., *Roberts v. Burlington Industries*, 477 U.S. 901 (1986), a state official, "the New York State Commissioner of Labor," was enjoined from enforcing a payout order she had issued against Burlington to pay out money from the corpus of an ERISA trust because of supposed rights under state law which were preempted by ERISA; against, an attack upon the corpus of an ERISA trust. If the money was paid out, it might never be recovered, causing irreparable harm to the ERISA plan. The Second Circuit held among other things, at page 329, that the federal district court could properly enjoin the state administrative proceeding and

that such injunctions did not violate the Anti-Injunction Act "even assuming that the Anti-Injunction Act applies to administrative proceedings of the Industrial Board of Appeals." And it is settled that such an injunction against an administrative proceeding is not an injunction against a state judge nor a state court; the Anti-Injunction Act only applies to judges.

We forego Mr. Felton's citation of family support cases since state garnishment in those cases was allowed, at district level with no appeal.

NEITHER THE RECORD NOR THE LAW SUPPORTED THE SUMMARY JUDGMENT BASED ON THE ERISA TIME-BAR

Summary judgment of prejudicial dismissal was entered in the face of affidavits that clearly show that if this were an ERISA case there were equitable and legal defenses of (1) adoption of state tolling provisions and limitations and (2) that Mr. Felton, because of his conduct in hiding his malpractice, should be estopped from pleading limitation.

As a state claim sounding in contract LOCA's suit is not barred for ten years; as an indemnity claim, it did not start running until the trustees borrowed the money and paid the hospital bills; there can be no claim for indemnity until there is money paid out. This was well within every statutory period, state or federal. Case law from both the state and federal jurisdictions was provided to that effect.

LOCA also pleaded that commercial malpractice (professional negligence that does not do injury to body or property) does not create a cause of action until there is commercial loss. Federal and state cases were cited on this point.

These matters still await the plenary merit hearing which they are entitled to if this is an ERISA case. (It is not, but we are not presumptuous.)

THE CONSTITUTIONAL ASPECTS

Mr. Felton's compassionate contention is that LOCA has ERISA rights but no ERISA remedy; that LOCA's case is an ERISA suit, but that ERISA preempts any state remedy without substituting an ERISA claim for his malpractice; a simple argument of pure confiscation: that the malpractice claims are an ERISA case, but since ERISA does not provide any damages because of malpractice (but nevertheless preempts malpractice claims) then regardless of the merits, LOCA is entitled to nothing even if it had filed timely in federal court. One moment we are entitled to damages under state law, the next moment we are not, neither in state nor federal court. LOCA, in the alternative, pleaded the Fifth Amendment of the Constitution of the United States; that if ERISA resulted in this confiscatory preemption, then LOCA was denied its rights of due process and equal protection.

JURY

LOCA also pleaded that its claim was based on tort which entitled it to a jury under the Seventh Amendment. (LOCA brought all these Constitutional questions up at the earliest possible moment by filing a written motion which was granted by the district court to note these Constitutional issues.)

Mr. Felton says that such a claim is not entitled to a jury because it is an equitable suit; whoever heard of a fist fight invoking equity jurisdiction?

SUMMARY

Judge Broussard can decide all of these points here as competently as most any other judges; he can certainly give us our day in court for a merit hearing on (1) the jurisdictional point and (2) on the cause.

This case should go back to state court for an orderly adjudication. This way, review by this Court of the jurisdictional question supposedly raised by ERISA could be saved until it is determined that there will actually be a need for such review.

This federal suit can be summed in a word: it is a trick and paradoxically it is a trick upon the federal courts, not the state, with all due respect and cordiality to the dicta of the Circuit Court.

Judge Broussard is neither half-mad nor half-witted; he is not lazy, nor indifferent, nor stupid, nor ignorant, nor disinterested, nor biased, nor prejudiced, nor corrupt, nor perverse; he is no mental midget, no moral imbecile; and he is not about to violate the oath he took that he would do a standard job in adjudicating the cases before him. That Mr. Felton might perceive him as not as bright, clever nor sophisticated as some other judges, state or federal, is no excuse for what Mr. Felton tried to do here.

Mr. Felton's assertion that he was hired "as a fiduciary for the Plan" (his page 5) is incorrect if not false if intended as a statement of fact; (actually he tried to state in writing that he was *not* an ERISA fiduciary; again, it is the actual facts that control, not what either party tried to say in the papers whether in their pleadings or their contracts; Mr. Felton would aggrandize himself as a "highway beautification engineer" although his sole task was to pick up beer

cans along the right-of-way). His assertion that LOCA sued him for "failure to provide for adequate Plan funding (his page 6) is true only if it means that LOCA sues him for actuarial malpractice in his recommendations of premium rates and these happened before there was any plan; he could only recommend such rates, not command them; he had no power whatever to overrule the trustees on anything.

CONCLUSION

Mr. Felton has been playing games with the courts below; he seeks to play another here. He is not really concerned about the state judge; but he sorely wants to stay away from that state jury as far and as long as he can. The last thing he wants to hear is, "They are coming in." So he jumps from one courthouse to another; then he races up an appellate ladder; he slyly bemuses us that the sue-clause is a meaningless ornament; that a common case of malpractice for a jury is really a suit in equity for a federal judge; he tries to turn ERISA inside out: a case by ERISA fiduciaries becomes by some legal magic a case against ERISA fiduciaries; all claims become ERISA claims.

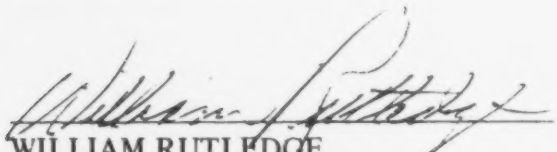
He has silently snickered at the courts below and hopes to do so here. For the question still stands, and he has not answered it, and he cannot answer it. Why did he not call upon the state court to rule upon the jurisdictional point, after an adequate merit hearing of the jurisdictional facts, the very jurisdictional point that he raised in his response to the state court's summons; he files his plea to the jurisdiction of the State Court and then after several years of hard work and discovery there on the part of everybody he dashes off without a word of warning in the middle of the night to federal court with his specious claim that he is entitled to a federal injuction of our state suit.

He talks of ready access; but does he really believe in it; he has had it for three years in state court. Now he wastes more time trying to run a common proprietary claim up a federal chain of exclusive jurisdiction. State or federal, use of either chain in a given case may waste the same amount of time, or more.

Mr. Felton is indeed a very bright fellow when it comes to jurisdiction; too bad he was not as clever with his actuarial calculations of probability and permutations; if he had been, none of us would be in either court now, state or federal.

Review should be denied now and forever.

Respectfully submitted,



WILLIAM RUTLEDGE
DOMENGEAUX & WRIGHT
P. O. Box 3668
Lafayette, Louisiana 70502-3668
(318) 233-3033
(800) 252-1953
Counsel for All Respondents

APPENDIX

APPENDIX A

ISSUES AND QUESTIONS RAISED:

(1) Who should decide whether the suit in state court was an ERISA suit?

> LOCA [Louisiana Oil field Contractors Association, its employee benefit trust and trustees] filed in state court before Mr. Felton [Gary Felton and his solely-owned company] filed his in federal. He lodged in state court an exception to its jurisdiction. Then, before ruling there he filed in federal court; he sought a declaration and an injunction to prevent the state court from deciding this question.

(2) Was there any equity in the bill of complaint for a declaratory judgment?

> Mr. Felton could have gotten the same declaration by simply moving his plea to the jurisdiction to ruling in state court so that the state court judge would decide it.

(3) Was there any inadequate remedy at law that would warrant a complaint being filed in federal court for a declaratory judgment?

(4) Was there any equity in the bill of complaint for injunction, when the Anti-Injunction Act clearly barred one if there were no exceptions created by ERISA?

> Mr. Felton could not allege that the state judge had ruled against him because he had not set his jurisdictional plea for hearing there.

(5) Did any of the exceptions in the Anti-Injunction Act apply because of the injunctive provisions of ERISA?

(6) Could the state suit be made an appendage of the federal by a federal court order that it be sent over and made a part of the federal record?

There had already been remand to the state court.

(7) Was Mr. Felton's remedy at law inadequate solely because he would have gone up through a state appellate chain to the United States Supreme Court, instead of up a federal, if the state court had ruled against him on the question of jurisdiction: whether the state suit was an ERISA case exclusively within federal jurisdiction?

(8) [If the state court should have decided the question of jurisdiction; and if the injunction violated the Anti-Injunction Act; and if there was no jurisdiction to bring the case up from state court to federal court a second time, then this appeal stops here: The federal case should be dismissed with prejudice and the parties be allowed to go on in state court, particularly after Mr. Felton discovered and litigated years in state court before he ever filed his federal suit.] But if not, then: Is this an ERISA case?

(9) Is LOCA now estopped from denying that its state suit is an ERISA suit because of ERISA allegations in it?

All ERISA allegations have been amended out of the state suit.

(10) Was Mr. Felton an ERISA fiduciary?

He had absolutely nothing to do with or about investments of trust assets in any form or fashion, directly or indirectly.

(11) If he was, did LOCA sue Mr. Felton as an ERISA fiduciary? Or, under the two-hats theory, as a consulting actuary?

He was guilty of malpractice in giving LOCA bad actuarial advice about the premiums to be charged for this hospital insurance. This caused the LOCA trust to go broke because of his bad actuarial consultation, nothing else. He gave the bad advice *before* the ERISA trust was formed, and before he did anything in the way of making administrative decisions as a third party administrator.

(12) Is there enough lawful evidence in the record to support the federal declaration; injunction; and judgment of dismissal of LOCA' s claims?

No oral testimony was taken in court. The record, though ten volumes long, does not contain a bit; this federal case has never been cried in open court.

(13) Was there any standing for either one of these suits, the state court suit or the federal court suit, to be brought under ERISA?

ERISA explicitly and completely specifies who has standing.

(14) If this is an ERISA case, has it been barred by limitation?

(a) Was Mr. Felton estopped to deny that the state case was sufficient to stop any statute of limitation?

He had the state case transferred to federal court as a valid ERISA case; and he prevailed on his pleadings when he did so. He now denies that state case satisfied the statute of limitations about filings.

(b) When did LOCA's cause of action accrue?

Among other damages, this is a case for an indemnity by Mr. Felton of LOCA for reimbursement of its outlay that it had to borrow because of Mr. Felton's bad actuarial advice; the borrowed money was paid out on claims within the period of limitation.

(c) Does the ERISA statute adopt (except for the question of actual or constructive knowledge) the state scheme of tolling which tolls limitations when a case is filed in the wrong courthouse if there is summons or citation within the prescribed period?

(d) If not, should there be an equitable adoption in this case in view of the years of litigation and discovery in state court?

(e) Is Mr. Felton estopped to plead limitation by his conduct and representations to LOCA?

He caused LOCA to believe that everything was all right and then caused it to believe that, if not, LOCA would be reimbursed money, anyhow, from the reinsurer.

(f) Did the state court suit amount to a factual commencement of an action under the ERISA statute that would toll ERISA prescription?

(15) If LOCA's purported ERISA claim has not been barred by limitation or prescription, does ERISA provide a remedy against Mr. Felton?

(16) If not, is ERISA in this case unconstitutional in its application because of violation of the Fifth Amendment for unequal protection or denial of due process, in that LOCA's claim for malpractice, which would exist but for ERISA, has been condemned by ERISA and taken from LOCA without giving LOCA anything in return, *quid pro quo* by way of substitute remedy or substitute defendant.

(This Constitutional question was raised below, explicitly, in writing, and at the earliest moment.)